

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Plaintiff,

v.

GUILLERMO CARDENAS,
Defendant.

No. CR-02-6057-FVS

ORDER

THE NINTH CIRCUIT remanded the above-entitled action for proceedings consistent with *United States v. Ameline*, 409 F.3d 1073, 1084-85 (9th Cir. 2005) (en banc). The defendant is represented by Edwin F. Alden; the government by Robert A. Ellis.

BACKGROUND

On May 15, 2003, the defendant pleaded guilty to one count of possession with intent to distribute a controlled substance. He stipulated to the quantities of the various controlled substances for which he was accountable. The parties assumed that the defendant had no countable criminal history. Had their assumption been warranted, the guideline range would have been 70-87 months. The government acknowledged the defendant might move for downward departure. The government agreed not to oppose departure as long as the defendant did not request a sentence below 60 months. As it turned out, the defendant had forgotten the fact that he had been convicted in 2000 of a felony drug offense in Benton County Superior Court. This precluded him from taking advantage of the "safety valve" and resulted in a guideline range of 87-108 months. After this

1 conviction came to light, the defendant did not move for downward
2 departure. The Court sentenced him to a term of 87 months
3 imprisonment.

4 **RULING**

5 The defendant claims his former attorney should have objected to
6 the calculation of his criminal history category and should have
7 sought downward departure on grounds of extraordinary acceptance of
8 responsibility and family considerations. Neither contention is
9 persuasive. To begin with, he was under state-imposed judicial
10 supervision when he committed the first of the distributions that he
11 admitted in the plea agreement and upon which his conviction rests.
12 Thus, the Probation Officer properly recommended adding two points to
13 the defendant's criminal history score based upon the existence of
14 ongoing supervision. U.S.S.G. § 4A1.1(d). Nor are the circumstances
15 of the defendant's case extraordinary in any respect. Thus, the
16 Court would not have departed below the guideline range. This does
17 not necessarily preclude resentencing. The issue is whether the
18 Court would have imposed the 87-month prison term had the guidelines
19 been advisory at the time sentence was pronounced. After reviewing
20 the matter, the Court is satisfied that the sentence it would have
21 imposed would not have differed materially had the Court known the
22 Sentencing Guidelines are advisory.

23 **IT IS HEREBY ORDERED:**

24 The Court declines to resentence the defendant.

25 **IT IS SO ORDERED.** The District Court Executive is hereby
26 directed to enter this order and furnish copies to counsel.

DATED this 7th day of March, 2006.

s/Fred Van Sickle
Fred Van Sickle
United States District Judge